IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL FROM ORDER NO. 59 OF 2004

Fomento Resorts And Hotels Ltd.,
a Public Limited Company registered
under Companies Act 1956, with its
registered office at Cidade de Goa,
Vainguinim Beach, Goa. ....Appellant

Versus

1. Goa Golf Club Private Ltd.,
   a Company incorporated under the
   Companies Act, 1956 and having
   its registered office at 184/189,
   Machado's Cove, Dona Paula, and

2. Britto Amusement Pvt. Ltd., a
   Company registered under the
   Companies Act, 1956, and having
   its registered office at 203, St. John
   Road, Bandra, Mumbai. ....Respondents.

Mr. M. S. Usgaokar, Senior Advocate with Mr. Sudesh Usgaokar and Sanjay Sardesai, advocates for the appellant.

Mr. V. B. Nadkarni, Sensior Advocate with Mr. M. S. Sonak, advocate for respondent no.1/caveator & 2.

CORAM : S. S. PARKAR, J.

DATE : 23rd June, 2005.

ORAL ORDER

By this Appeal From Order, the original defendants no.1 have challenged the order of the Civil Judge, Senior Division, Panaji, passed on 31st July, 2004, granting interim injunction in favour

of the respondent no.1/original plaintiffs restraining the appellants from interfering in any manner whatsoever with the suit licence and suit business.

2. The appellants are running a Five-Star Hotel under the name of "Cidade de Goa". The appellants had entered into an Agreement with the respondent no.1-Club allowing them to run an amusement centre (Casino) in their hotel since 1995. Thereafter the parties had entered into an agreement dated 4th January, 1999, allowing the respondent no.1-Club to run the amusement centre on certain terms and conditions. One of the conditions was that the Club shall shift the slot machines to premises owned or arranged by the Club, which would be leased to the appellants, on or before September, 2002. The Club had constructed their own premises on the rear side of the aforesaid Five-Star Hotel and a foot bridge was constructed by the appellants linking the Hotel with the new premises constructed by the Club. Thereafter the parties had entered into two Agreements dated 15th April, 2001, for a period of 11 months, which were subsequently renewed. This agreement expired on 31st March, 2003. The Club had entered into this Agreement because the condition for issue of licence by the Government for running amusement centre is that it should be run in a Five-Star Hotel only. By the Order dated 28th October, 2003, the

Government had granted six months' time to the Club and had obtained consent of the tenant. As the Agreement with the appellants had expired on 31st March, 2003, and the appellants refused to renew that Agreement, the Government had put the condition on the Club to obtain the necessary orders from the Court in a suit which the Club was contemplating to file against the appellants for continuation of the Agreement of 4th January, 1999. The said suit was filed on 27th April, 2004, and interim orders were obtained on 28th April, 2004, for status quo after giving notice to the appellants. Ultimately, after hearing the parties in the interim application for injunction the trial Court by a speaking Order dated 21st July, 2004, granted the interim injunction against the appellants from interfering with the suit licence and the suit business, till the final decision in the main suit. That order is under challenge in this appeal.

3. The appellants contended firstly that the Agreement ceased to operate by virtue of the new Agreement entered into between the parties on 15th April, 2001, subsequently renewed, which also expired on 31st March, 2003, and therefore, no rights can be claimed by the Club under the Agreement of 1999. Mr. Usgaokar placed reliance on the decision of the Supreme Court in the case of ***Nagubai Ammal & Ors. vs. B. Shama Rao & Ors.***, (1956 SC 593), in which it

was held that the plaintiff is not permitted to approbate and reprobate and a person cannot say at one time that a transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid and then turn round and say it is void for the purpose of securing some other advantage. The aforesaid judgment is cited to emphasize that the respondent-Club has taken advantage of the subsequent Agreement of 15th April, 2001, in which it is expressly mentioned that the Agreement of 1st January, 1999, has been superseded by virtue of Clause vii.9 of the Agreement of 15th April, 2001.

4. The respondent-Club had filed a suit challenging the subsequent Agreements on the ground that the same were entered into by the respondent-Club due to undue influence which was exercised by the appellants by arranging/inducing a police raid on their premises on 8th March, 2001, after they had shifted to the new premises in September, 2000, and they were forced to enter into the second Agreement immediately after that raid on 15th April, 2001, as they had invested a sum of rupees two crores for the construction of the new building as well as for the purchase of slot machines. But for the Agreement of 15th April, 2001, obtained by the appellants by the exercise of undue influence on the respondent-Club, the Agreement of

1st January, 1999, would have continued.

5. Secondly, it is argued on behalf of the appellants that by the Government Order dated 28th October, 2003, the last day of the expiry of six months period granted to the Club by the abovesaid order was 27th April, 2004. It is pointed out that the suit was filed on 27th April, 2004, i.e. the last day granted by the aforesaid order of the Government to obtain the necessary orders, otherwise the licence issued to them would be cancelled. In support of this contention reliance is placed on the judgment of the Supreme Court in the case of ***Morgan Stanley Mutual Fund vs. Kartick Das***, [(1994)4 SCC 225], in which it has been held inter alia that the Court will also consider the time at which the plaintiff first had notice of the act complained of so that the making of an improper order against a party in his absence is prevented and whether the plaintiff had acquiesced for sometime in which case ex parte injunction would not be granted.

6. No doubt the respondent had filed the suit on the last day, but the orders were obtained from the Court after giving notice to the appellants. The first Order was passed on 28th April, 2003, though after giving very short notice to the appellants, as it is pointed out that notice was received by the appellants at 11 a.m. on that day

and the matter was to be heard at 2.30 p.m. Ultimately, after hearing both the parties the earlier ad interim order which was also passed after hearing both sides, was confirmed later on by the impugned order. One cannot forget that in certain cases the party tries to approach the other side for negotiations and avoids going to Court as far as possible, unless the other side is not willing to negotiate. It is pertinent to note that the Supreme Court in paragraph 36 of that judgment has also pointed out the factors which should weigh with the Court in the grant of ex parte injunction. One of the factors mentioned in the said paragraph for grant of injunction is whether irreparable or serious mischief will ensue to the plaintiff and secondly whether the refusal of ex parte injunction would involve greater injustice than the grant of it would involve. The trial Court has precisely considered these aspects.

7. It is well-settled that in order to grant interim injunction the plaintiff has to make out a prima facie case and secondly, the Court has to see the balance of convenience. The trial Court has pointed out in its impugned Order that the respondent-Club had invested a large sum of money and the respondent-Club was forced to enter into the Agreement of 15th April, 2001 because of the police raid on their premises, which took place on 8th March, 2001. The proximity between the dates of the police raid and the date of the second

Agreement superseding the Agreement of 1999, would indicate that prima facie the respondent-Club had come under pressure and, therefore, agreed to sign the Agreement of 15th April, 2001. The correspondence between the parties and in particular the letter dated 16th March, 2004, addressed to the appellants by the respondent-Club, shows that the appellants were insisting that the respondent-Club should grant lease in respect of the entire property constructed by the Club and not only the premises to which they had shifted their amusement centre from the hotel of the appellants. That demand was made with reference to Clause 36 of the Agreement of 1999. In that Clause the word used is "premises" and not " building" owned or arranged by the first party, where they would shift their slot machines. Therefore, what was required under Clause 36 was that the Club should create a lease in favour of the appellants in respect of the premises to which they had shifted their amusement centre. The insistence by the appellants to create a lease in respect of the entire property does not appear to be prima facie justified.

8. Moreover, it is not in dispute that all throughout the respondent-Club had continued to run the aforesaid business and, therefore, the trial Court cannot be faulted for granting injunction when a prima facie case has been made out by the plaintiffs/respondent no.1.

9. In view of the above, I do not find fault with the impugned Order. The contention that the impugned Order is not in accordance with the prayers in the plaint also is without any substance because the Court is always empowered to mould the relief according to the situations and the Court has granted a limited injunction against the appellants/original defendant no.1. Ofcourse, when the respondent-Club continues to run the business by virtue of the injunction order granted against the appellants, it goes without saying that they are liable to pay to the appellants consideration as per the Agreement of 1999 and in particular Clauses 37, 38 and 39 of the Agreement of 1999. The appellants have not suggested any figure which would be due to them in case the Clauses of the 1999 Agreement are enforced. However, it would be desirable to direct the respondent-Club to deposit some lump sum amount towards the arrears and continue to deposit the recurring amount as per Clauses 37 to 39 of the Agreement of 1999.

10. In the result, this Appeal is dismissed. However, the respondent no.1-Club is directed to deposit a sum of Rs.l0,00,000/- (rupees ten lakhs only) in the trial Court within a period of six weeks from today and continue to deposit the recurring amount payable to the appellants as per Clauses 37 to 39 of the Agreement of 1999 in the trial Court from 1st July, 2005. The recurring amount shall be deposited on

or before the 10th day of every succeeding month. After the amount of Rs.l0,00,000/- is deposited by the respondent no.1-Club it shall be invested in a nationalized Bank in Fixed Deposit, initially for a period of one year and thereafter renewed as and when required. The trial of the Special civil Suit No.44/04/B is expedited. The suit shall be disposed of by the trial Court as far as possible by the end of June, 2006.

S. S. PARKAR, J.

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